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Clerk

Supreme Court of the United States,

OCTOBER TERM, 1902,

NO. 223.

TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

SAMUEL E. WATSON,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

J. W. BAILEY,
E. S. CHAMBERS and
AMOS. L. BEATY,
Counsel for Defendant in Error.

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REPLY TO ASSIGNMENTS III, IV, V AND VI.

There was no error in allowing witnesses to testify to fires other than the cotton fire, although they did not see them start, when such other fires were shown to have commenced burning almost immediately after the passing of the locomotive that is claimed to have set out the cotton fire.

Railway vs. Richardson, 91 U. S. 454.

Butcher vs. Railway, (Cal.) 8 Pac. Rep. 176.

Railway vs. Donaldson, 73 Tex. 124; 11 S. W. Rep. 164.

Railway vs. Kreig, (Ind.) 53 N. E. Rep. 1035.

Railway vs. Keith, (Ind.) 35 N. E. Rep. 298.

Railway vs. McCorkle, (Ind.) 40 N. E. Rep. 27.

Railway vs. Middlecoff, (Ind.) 37 N. E. Rep. 27.
Wiley vs. Railway, 44 N. J. Law 247.

The suit was for the value of cotton destroyed by a fire alleged to have been set out by a locomotive, and the facts pertinent may be briefly stated: A freight train of plaintiff in error was passing the cotton going east when the fire started. The engine had passed but the caboose was not yet opposite the cotton. Steam was being worked and the locomotive was puffing. A strong wind was blowing from the north and a dense smoke from the engine blew towards the cotton, which was located about fifty feet south of the track on which the train was moving. Sparks and live cinders were seen escaping and falling at this time. (Record, 23-27.) H. A. Green testified that he was on the railroad about three miles west of Clarksville, where the fire occurred, and that as this train passed him half an hour before the cotton fire there were fire and sparks escaping from the locomotive and that cinders fell around him and on him and set the grass on fire about 25 or 30 yards from him and about 30 feet south of the railroad track. (Record 28.) L. A. Rains was also west of town and saw this train pass. He testified that it set the grass on fire near him and about 40 or 50 feet south of the track. (Record 29.)

In this connection James Aydelot, who was at the oil mill in Clarksville, and about 360 feet east of the cotton, was permitted to testify over objection that as this train pulled out it set fire to shavings at the oil mill 60 feet south of the track and dropped cinders on a work bench and on the ground, and

defendant in error was permitted to prove by the witness Green that after leaving the grass fire, which he saw set out, he went down the railroad track and saw grass burning in two other places about 30 feet from the track, that he did not see these fires start, but that they were on the same afternoon as the cotton fire and immediately after the train passed. He was also permited to prove by the witness Rains that in addition to the fire he saw started by the engine he saw a fire burning about the same time in the grass some 40 feet south of the track and another about 60 feet, and Lee Cooper was allowed to testify to seeing grass burning east of town near the track and on the south side just after the same train had gone. The admissibility of the proof of these fires, when the witnesses did not see the very sparks in the act of igniting the grass, is the question raised.

Railway vs. Richardson, supra, is decisive of the admissibility of proof of other fires when there is no question as to how they originated.

The argument that when the witness did not see the fires start, to admit this proof is to allow presumption to be founded upon presumption, is commendable only for ingenuity. If proving the other fires merely established collateral facts the objection would have more force, but the proof tended circumstantially to establish the main fact and to bring home a conviction as to the matter in issue. The mind naturally accepts this kind of testimony as some proof and unless artificial rules have intervened it will surely be held admissible.

Butcher vs. Railway, supra, decided by the supreme court

of California, is in point, and it will be seen that the evidence offered there was much more remote and less cogent than that in the present case. The following extract from the opinion states the point and the conclusion of the court: "At the trial of this cause a witness, Sherman Marshall, was permitted, notwithstanding the objection of defendant, to testify that about two weeks after the fire which is alleged to have burned plaintiff's property, (at a place from a quarter to one-half a mile distant from the spot where the fire in question here was kindled), he saw fire in a field near defendant's road, just after a train of cars had passed, drawn by the same engine from which, as claimed, the fire escaped which caused the damage sustained by plaintiff. Evidence that sparks and coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence and to make it probable that the plaintiff's injuries proceeded from the same quarter. * * * In the aspect of the case most favorable to defendant, there is no evidence in the record that the fire which caused the destruction of paintiff's crop was caused by defendant's engine, other than the fact that the fire commenced, or was seen, very soon after the engine passed, and that a high wind was blowing. As an inference from these facts, considered with or without evidence as to the character of the engine, its management, etc., the jury may have been authorized to find that the engine caused the fire. Conceding evidence that engines of defendant communicated fire to other property on other occasions would tend to show negligence, and to render it more

probable that the fire was, in this case, so communicated, can facts from which a similar inference might be drawn give greater force to the *inference* that the fire which destroyed the plaintiff's property came from the defendant's engine, because the engine had just passed and a wind was blowing? The witness did not swear that, on the occasion to which he testified, he saw sparks issuing from the smoke stack. Certainly such evidence approximates very closely the line which separates evidence merely collateral and independent from the evidence bearing upon the issue made by the pleading. It may be said to be an attempt to add to a probability by another probability; to support an inference by an inference. Yet if it is permissible by direct proof to show that other fires were caused by defendant's engines, is it not permissible to show facts tending to prove that other fires were so caused? If many fires had occurred along the line of defendant's road under circumstances like those appearing in the present case, the fact would have tended to show negligence in the management of defendant's business, and that this particular fire was started by the locomotive. Proof of a single fire should have much less weight than proof of many fires, but we cannot say it was absolutely irrelevant."

In *Railway vs. Donaldson, supra,* the supreme court of Texas had occasion to pass on this question. The issue was whether the defendant with its engines had negligently set fire to the plaintiff's grass. It was held that if the evidence *tended* to show that other fires were started by the company's engines it was permissible to prove them, but that it was not proper to prove a fire that the evidence did not *tend* to show

was attributable to the engine. The court, through Chief Justice Stayton, said: "The evidence of the witness, however, as to other fires was not confined to such fires as were shown to have arisen *soon after defendant's engines had passed*, or as were shown to have resulted from the escape of fire from engines of defendant but referred to fires generally, which may have occurred from the negligent or wilful acts of others." (The italics do not appear in the opinion.)

The other cases cited above all affirm the admissibility of proof of other fires when it is shown that they are seen burning just after the train has passed. And it is submitted that no case can be found holding that, in order to prove such other fires the witness must actually see the spark descend, observe the process of combustion, and behold the flames spring forth, which is the effect, logically, of the railroad's contention. It will not do.

REPLY TO ASSIGNMENT VII.

The objection made to the testimony of witnesses to the effect that they saw no opportunity and knew of none for the cotton to have caught fire except from the locomotive, was properly overruled.

Pullman vs. Smith, 79 Tex. 479; 14 S. W. Rep. 993.

It being proper to exclude, by proof, the probability of the fire having originated from agencies other than the engine,—and proof of this character is, under some circumstances, essential,—the evidence introduced was certainly relevant

and material. The remaining ground of objection is that the evidence was in the nature of a conclusion of the witnesses to the effect that the fire did originate from the engine. It will be observed that no objection was made on the ground that the statements of the witnesses involved a conclusion as to what would be the absence of an opportunity. The point was not made that the witnesses should state whether they saw any one near the cotton, and if so whether with matches or lighted pipes, or whether there were any fire flues in the vicinity, leaving it for the jury to say whether these would have been opportunities or their absence the lack of opportunities. That was not the objection. It was urged merely that to prove the absence of other opportunities, *as a fact,* would involve the giving of a witness' opinion that the fire was kindled by the engine. Counsel were doubtless mindful that almost any statement embraces conclusions to a certain extent. The statements that the train was a long one, that it was running slow or fast, that it was puffing hard, and the like, and even the fact that it was a freight train, were all conclusions in a sense, and in the same sense that saying a certain thing is or is not an opportunity for fire; so the objection was not made except as stated. If it be conceded that the statements in question implied conclusions by the witnesses that the passing of the engine was an opportunity for the cotton to catch, still, it does not follow that they implied that the cotton did catch in that way, but at most only that there was an opportunity of that kind, and there is no dispute that the passing of this engine was in fact an excellent opportunity. Moreover, if by any process of refined distinctions an error could be spelled out of

this ruling it would not be one for which the case should be reversed, because the evidence was overwhelming that the fire did originate from the engine and was in fact so conclusive, without the testimony now being discussed, that the minds of reasonable men could not have differed as to that, though it may be conceded that it was otherwise on the issues of negligence and contributory negligence.

Pullman vs. Smith, supra, by the supreme court of Texas, seems to be a case in point and is decisive even if every construction that might be contended for by plaintiff in error were to be placed. There the plaintiff's wife had been injured through the negligence of the Pullman Palace Car Company, her health had become impaired, and one of the issues in the case was whether such impairment was due to the injury received at the hands of the company. In answer to a question she was allowed, over objection, to state: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." Held, no error.

REPLY TO ASSIGNMENT VIII.

It was proper to allow the hypothetical question put to the company's expert witness, Wells, on cross examination

Transportation Line vs. Hope, 95 U. S. 297.

Railway vs. Price, (C. C. A.) 97 Fed. Rep. 425.

Railway vs. Novak, (C. C. A.) 61 Fed. Rep. 579.

12 Am. & Eng. Enc. Law (new ed.) page 472.

1 Greenleaf on Evidence sec. 440, 440a.

2 Taylor on Evidence sec. 1275.

Taylor vs. Star (Iowa) 81 N. W. Rep. 251.

Williams vs. Railway (Minn.) 37 L. R. A. 204.

On authority of the two last cases cited and many others that could be found it might properly be held that in-as-much as the witness was in the employ of the railway company and was placed on the stand by it, and that too as an expert, he could be asked the question complained of for the purpose of testing his knowledge and credibility and of determining his interest or partiality. This cannot be better illustrated than by the answer he gave. After having qualified as an expert and testifying at length explaining the construction and operation of engines and spark arresters and that he had charge of that particular part of the company's business, he gave it as his opinion that a perfect spark arrester cannot be made. He was then cross examined. On this cross examination he admitted that allowing the fire in an engine to burn low and then opening the throttle, or permitting the spark reservoir to become filled, or the ashes to accumulate in the ashpan would tend to make an egine throw more sparks. He was then asked the hypothetical question as to whether an engine properly constructed and properly operated would do as this one was shown to have done, the facts in evidence being enumerated His reply was evasive and circuitous as follows: "An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ashpan might drop among it and set fire. What you have said might have occurred,

but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ashpan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition." Then on redirect examination he proceeded to destroy the effect of the reluctant admission he had made by saying: "A fire can originate from an engine even when it is properly equipped. If I were told that five fires or eight fires were set out from an engine running a short distance over a track at a distance of a few feet from the track I would believe that the engine had something out of condition, but if an actual examination of the engine showed its condition to have been good and proper where the fires were set out, in the face of this evidence I would not believe that the engine was in bad condition." (Record 35.) Here on redirect examination is where he gave his opinion on the effect of evidence and yet plaintiff in error has the hardihood to complain.

But suppose Mr. Wells had been introduced by defendant in error and the hypothetical question had been asked on his examination in chief, would it not have been proper?

It is well settled, and the railroad company recognized the doctrine by placing its expert on the stand, that in matters of this particular kind the opinions of experts are receivable in evidence. 12 Am. & Eng. Enc. Law (new ed.) 472, and cases there cited.

And the witness may give his opinion on the very issue to be decided by the jury provided it involves a matter on

which expert evidence is admissible and not merely a question the ordinary mind is capable of determining. *Transportation Line vs. Hope,* 95 U. S. 297.

In the case last cited the issue being tried was whether it was negligence for a certain tug-boat to undertake to tug three boats abreast, with a high wind. An expert was asked the direct question of whether such a thing would be safe or prudent. This court said: "The witness was an expert and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. It is not an objection, as is asumed, that he was asked a question involving the point to be decided by the jury. As an expert he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land, *Clark vs. Baird* 9 N. Y. 183; *Bearss vs. Copley* 10 N. Y. 93; or as to the value of a particular breed of horse, *Harris vs. R. R. Co.* 36 N. Y., Supr. Ct. 373; or upon the value of the professional services of a lawyer, *Jackson vs. R. R. Co., 2* Thomp. & C. (N. Y.) 653; or on the question of negligence in moving a vessel. *Moore vs Hestervelt,* 9 Bosw. 558; or on the necessity of a Jettison, *Price vs. Hartshorn* 44 N. Y. 94. In *Welsh vs. Ins.*

Co., 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of a vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using the language: 'We entertain no doubt that those who are accustomed to the responsibility of command and whose lives are spent on the ocean are qualified as experts to prove the practical effect of cross seas and heavy swells, shifting winds and sudden squalls.' The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which objection is made."

The case at bar, like the one just refered to, is very different from those involving ordinary questions of physics concerning which the average mind is deemed competent to draw its own conclusion. In short, the testimony here was on an issue that was a proper subject for expert testimony, and that being true, it makes no difference that the witness may have expressed his opinion as an expert, on one of the ultimate questions to be decided.

REPLY TO ASSIGNMENT IX.

The trial court properly admitted the deposition of the witness Caperton, although the witness was personally present and could have been called. Or, if there was error it was harmless.

Revised Statutes Secs. 861, 866.

27 U. S. Statutes 7 (Act 1892.)
Whitford vs. Clark 119 U. S. 522.
Hinds vs. Keith (C. C. A.) 57 Fed. Rep. 12.
Schmick vs. Noel 64 Tex. 406.
O'Connor vs. Andrews 81 Tex. 28; 16 S. W. Rep. 628.
Railway vs. Renkin 38 S. W. Rep. 830.
6 Enc. Pl. & Pr. page 570.

While it does not affirmatively appear from the record that the deposition was taken under a *dedimus potestatem* it does appear that it was taken in accordance with the state law. There is no provision in the latter authority authorizing the taking of depositions *de bene esse*, but it is provided that "after the service of the notice of filing the interrogatories has been completed the clerk or justice shall issue a commission to take the deposition of the witness named in the notice." Art. 2279. The objection was not put upon the ground that no commission had issued, but was solely upon the ground that the witness was in court and should be placed upon the stand. So it may be safely assumed, especially in view of the court's ruling and the presumption in favor of the regularity thereof, that this deposition was taken under a commission or *dedimus potestatem*.

Section 861 of the United States Statutes provides: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

Section 866 provides for the issuance of a *dedimus potestatem* to take depositions according to common usage, and also

stipulates that the provisions of sections 863, 864 and 865 shall not apply in such cases.

The sections 863-865 here referred to are those relating to depositions *de bene esse* and contain among other things a provision that such deposition cannot be used unless the witness is dead or more than one hundred miles from the court, etc. But, as stated, the application of these provisions is expressly excluded, and there is absolutely no statutory restriction or limitation as to the use, when depositions are taken under a *dedimus potestatem*.

Whitford vs. Clark, supra, holds that a deposition taken *de bene esse* is not admissible under such circumstances as existed in the case at bar because of the statute, section 865, providing in effect that it shall not be except when the witness' presence cannot be obtained, but the court proceeds to say: "As to depositions taken under a *dedimus potestatem* in accordance with section 866 of the Revised Statutes, this provision of section 865 does not apply, for it is expressly so enacted in that section."

Furthermore, the act of 1892 provides that in addition to the Federal mode of taking depositions they may be taken according to state law and usage, and section 914 provides that the practice in the Federal courts in common law cases shall conform, as near as may be, to the practice in the state courts.

The circuit court of appeals in affirming the judgment of the circuit court held the ruling to be erroneous but harmless in view of the fact that plaintiff in error afterwards placed the

witness on the stand and he testified fully concerning the matters covered by the deposition. (Record 51.)

REPLY TO ASSIGNMENT X.

The issue of whether the engine was equipped with the most approved spark arresters was properly submitted to the jury.

McCullen vs. Railway, (C. C. A.) 101 Fed. Rep. 66.
Railway vs. Rice, (Tex.) 59 S. W. Rep. 833.
Smith vs. Railway. 55 N. W. Rep. 717.
Babcock vs. Railway 13 N. W. Rep. 740.

Practically all the evidence bearing on this issue has been stated in the first part of the brief, excepting certain testimony that was given by the conductor in charge of the train, Mr. Caperton. It appeared that on modern engines the spark arresting appliance includes a netting which is adjusted in the front end and not in the smoke stack. (Record 30-35.) The witness Caperton in a deposition taken by the company and introduced by the plaintiff testified that he examined the engine just after the fire, referred to it as being in good condition, and said the netting was over the top of the smoke stack. (Record 37.) He was then placed on the stand by the company, and said this was a mistake; that either he or the notary made a mistake for the netting was not on the smoke stack but in the extension front. He admitted that he read the deposition and signed it. (Record 38.)

Though the witness was at best very negligent in giving

testimony, if not in running trains, he may have made an honest mistake—according as the jury may have believed—but it was a question for the jury.

But eliminate this particular testimony and still the issue was raised by the proof showing the manner in which the fire originated and the fact of the other fires.

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REPLY TO ASSIGNMENT XI.

The court having charged the jury that the plaintiff could not recover if the defendant's engine was properly equipped and properly operated, even if sparks were communicated to his cotton, it was no error to refuse another charge to the same effect but incorporating, as a reason, that the plaintiff had assumed the risks to be anticipated from engines properly equipped and properly operated.

The special instruction requested might weli have been gve but for the fact that it would have been a repetition. The court had plainly told the jury that the plaintiff could not recover in any event if the company used the most approved spark arresters, kept them in good condition, and operated its engine with ordinary care. (Record 39.) Now, would it have added anything to have appended the following sentence: "*Because* the plaintiff assumed the risks which were to be anticipated from engines with proper spark arresters and properly operated"? What is the difference between saying, "If the engine was properly equipped and operated Watson cannot recover," and saying, "Watson assumed

the risks incident to the proper equipment and operation of the engine, and therefore, if the same was properly equipped and operated he cannot recover"?

The doctrine of assumed risks does not apply here any way. If there had been an engine on the road that habitually threw large volumes of fire and was not supplied with any means of arresting sparks and the plaintiff, knowing of this engine and knowing it would pass, had placed his cotton close to the track, there might be what is technically known as assumed risk, just as when an employe of a railroad knowingly undertakes to work with dangerous machinery. In either case there would be negligence on the part of the road, but no recovery could be had because the risks were assumed. The risks that are assumed within the meaning of the term "assumed risks" are risks from improper rather than from proper operation. Otherwise, since a passenger assumes the risks incident to his voyage from the proper operation of the trains on which he takes passage, and since one also assumes the risks naturally incident to living, it could be insisted that the court should so charge the jury, and thus the term would become superfluous and meaningless. Of course risks from proper operation are assumed, always, and that should be understood without being said.

The learned trial judge was correct when he declined to go further than to give the charge that he gave, including a plain, clear instruction on contributory negligence.

REPLY TO ASSIGNMENT XII.

The trial court was right in excluding the stipulations exempting the railway company from liability, as contained in the lease contracts under which O'Neil held the platform on which the cotton was stored.

McAdams vs. Railway, (Tex.) 45 S. W. Rep. 936.

King vs. Railway, (Cal.) 29 L. R. A. 755.

Ordelhide vs. Railway 80 Mo. App. 507.

It is conceded that defendant in error was no party to the contract and that he had no notice of it or the stipulations in question, but it is contended that O'Neill was in law a party to the contract, that the stipulations were valid and binding as to him and that since the right of defendant in error to store his cotton on the right of way came through O'Neill he must be bound by the release.

The cases cited deal with the proposition and in those cases the question of notice was also involved. They fully recognize the doctrine of *Hartford Insurance Company vs Railway* and make the distinction here contended for. According to their holdings the stipulations would not have been binding on Watson even if he had known of them. In a case like this, however, where there is no notice, it seems really too clear for argument.

It is submitted that at least two of the grounds of objection were well taken, viz.: (1) that the contracts did not purport to release the railroad company from any damages except such as the lessees might sustain, it not being contemplated to release from damages to other parties, and (2) that the plaintiff was not a party to the lease and had no notice of

the stipulation releasing the railroad company from damages.

May the judgment be affirmed.

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